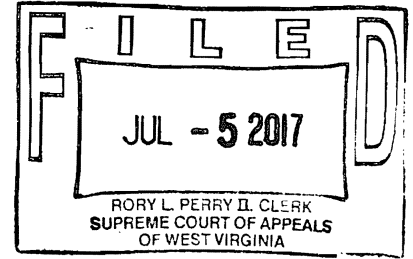


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NO. 14-0096

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMFM, LLC, Commercial Holdings, LLC,
Integrated Commercial Enterprises, Inc.,
Manzanita Holdings, LLC, Lifetree, LLC,
Wineberry, LLC, Hillcrest Health Care Center, LLC,
d/b/a Hillcrest Health Care Center, Tammy Fortney,
Matthew Poorman,



Petitioners,

v.

On Appeal from Kanawha County
Civil Action No. 16-C-1071

Kimberly Shanklin, on Behalf of the
Estate of Lena Nelson,

Respondent.

PETITIONERS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The Circuit Court erred when it denied Petitioners' *Motion to Dismiss Plaintiff's Complaint and Compel Arbitration*. In ruling that Petitioners failed to meet their burden of demonstrating that Plaintiff Kimberly Shanklin had the requisite authority to waive Lena Nelson's right to a jury trial and enter into an Arbitration Agreement on her behalf, the Court impermissibly singled out the Arbitration Agreement for heightened scrutiny and further imposed a duty on third parties to conduct an investigation when presented with an executed power of attorney contrary to West Virginia law.

Respondent's argument in response to Petitioners' brief is that Ms. Shanklin was not acting as her mother's Durable Power of Attorney on the date of her admission to Hillcrest; that she was designated as the "alternate" and not primary Durable Power of Attorney ("DPOA"), with the primary designation being given to her brother, Stephen Nelson; and that, as such, the Arbitration Agreement signed by Ms. Shanklin on her mother's behalf on the date of admission was not signed by her proper DPOA because it was not signed by Stephen Nelson. As such, Respondent argues that any and all contracts signed by Ms. Shanklin on behalf of her mother on her date of admission—including, specifically, the Arbitration Agreement—are unenforceable.

Respondent's argument fails for a multitude of reasons. Lena Nelson appointed Ms. Shanklin as her alternate DPOA in the event that the primary designee, Stephen Nelson, could not or would not serve as DPOA—something Respondent has not disputed. *See* DPOA, JA, p. 000115-000120. Specifically, the DPOA document states as follows: "If, **for any reason**, STEPHEN NELSON cannot or will not serve as such, then I do hereby make, constitute, and appoint my daughter KIMBERLY SHANKLIN, of Charleston, Kanawha County, West Virginia, my true and lawful attorney, for me and in my name, place, and stead with all for the aforesaid

powers.” *Id* (emphasis supplied). The record below demonstrates that Kimberly Shanklin had actual authority as attorney-in-fact for Lena Nelson which she exercised extensively both before and after executing the subject Arbitration Agreement. Consequently, this Court should reverse the lower Court’s Order on *Defendant’s Motion to Dismiss Plaintiff’s Complaint and Compel Arbitration* and remand with instructions that the Motion be granted.

ARGUMENT

I. RESPONDENT MISINTERPRETS THE WEST VIRGINIA UNIFORM POWER OF ATTORNEY ACT.

A. The precise text of Section 111 of the WV UPAA does not control the Court’s analysis because Lena Nelson modified Section 111’s default rules when she drafted her Durable Power of Attorney document.

The West Virginia Uniform Power of Attorney Act (hereinafter “WV UPAA”) sets a series of default rules governing powers of attorney which are subject to modification by the drafter of the document. This is evident both in the prefatory notes and comments on the 2006 model act authored by the National Conference of Commissioners on Uniform State Laws, and by the fact that the phrase “unless the power of attorney otherwise provides” appears in the version of the model act adopted by the West Virginia legislature a total of twenty (20) times. Specifically, Section 111 of the WV UPAA codifies only the *default* rules for when a successor agent may act pursuant to a power of attorney, and states as follows: “***Unless the power of attorney otherwise provides***, a successor agent . . . May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.” W. Va. Code § 39B-1-111(b) (emphasis supplied).

When Ms. Nelson drafted her DPOA document, she elected a more expansive provision for substitution of one agent for another:

If, *for any reason*, STEPHEN NELSON cannot or will not serve as such, then I do hereby make, constitute, and appoint my daughter, KIMBERLY SHANKLIN, of Charleston, Kanawha County, West Virginia, my true and lawful attorney, for me and in my name, place, and stead with all of the aforesaid powers.

JA at 119 (emphasis supplied). In contrast, under the WV UPAA, Mr. Nelson would need to have resigned, died, become incapacitated, disqualified, or declined to serve. However, Lena Nelson chose a different standard, as was her right both at the time she executed her DPOA document in 2010 and in 2012 when the WV UPAA was enacted.

In this case, the reason why Mr. Nelson could not serve as Ms. Nelson's agent is because Ms. Shanklin made the decision to have Ms. Nelson transferred from Charleston Area Medical Center ("CAMC") to Hillcrest Health Care Center; and consequently, Mr. Nelson was not present at the time of Ms. Nelson's admission to Hillcrest. Ms. Shanklin, however, was present—and she acted in accordance with the authority delegated her.

B. Plaintiff incorrectly asserts that Section 119 of the WV UPAA does not apply to successor agents, and the plain text of the Act belies this assertion.

When the Legislature enacted the WV UPAA, it incorporated a specific definition of the word "agent" as follows:

In this Act: (1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact or otherwise. *The term includes an* original agent, coagent, *successor agent* and a person to which an agent's authority is delegated. . . .

W. Va. Code § 39B-1-102 (emphasis supplied). In Section 119 of the WV UPAA, the Legislature provides that:

A person who in good faith accepts an acknowledged power of attorney without actual knowledge that the . . . purported agent's authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely

upon the power of attorney as if . . . the agent had not exceeded and had properly exercised the authority¹ . . .

W. Va. Code § 39B-1-119. By operation of the statutory definition of “agent”, this Section *expressly includes* successor agents such as Ms. Shanklin. Argument to the contrary is merely an invitation to ignore the plain language of the statute. Justice Clarence Thomas warns against this very practice; “[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Martin v. Randolph Co. Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399, 414 (1995).

Although Plaintiff would like to read the statutory definition of “agent” right out of Section 119, the plain text of the statute and the very first rule of statutory interpretation counsels otherwise. Accordingly, the law imposes no duty on Hillcrest to question Respondent’s authority to act as successor agent.

II. KIMBERLY SHANKLIN EXERCISED THE RIGHTS GRANTED TO HER BY THE DPOA DOCUMENT BEFORE, DURING, AND AFTER MS. NELSON’S ADMISSION TO HILLCREST HEALTH CARE CENTER.

According to the DPOA document in question, in the event that Stephen Nelson could not or would not serve (for any reason), Ms. Shanklin was Ms. Nelson’s “alternate” DPOA and as such was given certain powers and legal rights. These rights included, but were not limited to, the legal right to make medical decisions on Ms. Nelson’s behalf. Specifically, among other things, the DPOA document granted Ms. Shanklin the right “to do and sign [Lena Nelson’s] name to whatever might be required or appropriate to admit [Lena Nelson] to hospitals and other care facilities; to employ and engage doctors, nurses, and other medical personnel and to arrange for and consent to medical treatment of [Lena Nelson]”. *See id.* at. ¶ 16. The DPOA document

¹ This section includes an exception for transfers of real property not relevant here.

further states as follows: “I specifically authorize and empower my said attorney-in-fact to sign, for and on my behalf and in my name, such consent forms as may be required as a prerequisite to treatment of me.” *See id.* The DPOA document also granted Ms. Shanklin various other non-medical related legal rights, such as the right “to endorse all checks and drafts made payable to [Lena Nelson’s] order,” “to sign in [Lena Nelson’s] name checks on all accounts standing in [Lena Nelson’s] name and withdraw funds from those accounts,” and “to open bank accounts in [Lena Nelson’s] name”. *See id.* at ¶¶ 2-4.

Not only did Ms. Shanklin exercise these rights on the date of Ms. Nelson’s admission to Hillcrest Health Care Center on February 15, 2013, as is more fully detailed below, Ms. Shanklin began exercising these rights, and acting as Ms. Nelson’s Durable Power of Attorney as early as 2011—two years prior to Ms. Nelson’s admission to Hillcrest. For example, per Ms. Shanklin’s own deposition testimony, she began writing checks on her mother’s behalf in 2011 after Ms. Nelson began experiencing dementia, thereby exercising one of many rights afforded to Ms. Nelson’s Durable Power of Attorney. *See* JA at 207. Additionally, in Plaintiff’s discovery responses, she admitted to exercising these rights, specifically as follows:

INTERROGATORY NO. 2: Please state whether Kimberly Shanklin ever did any form of business with any banks, savings and loan associations or financial institutions on behalf of Lena Nelson, or with relation to any accounts held/owned by Lena Nelson.

RESPONSE: Yes.

INTERROGATORY NO. 3: Please state whether Kimberly Shanklin ever endorsed any checks or drafts on behalf of Lena Nelson.

RESPONSE: Yes.

INTERROGATORY NO. 4: Please state whether Kimberly Shanklin ever signed her name to checks on any checking, saving, or other financial accounts owned by/belonging to Lena Nelson.

RESPONSE: Yes.

INTERROGATORY NO. 5: Please state whether Kimberly Shanklin ever held or opened any bank accounts in Lena Nelson's name, or jointly with Lena Nelson.

RESPONSE: Yes.

...

INTERROGATORY NO. 7: Please state whether Kimberly Shanklin ever represented or acted on behalf of Lena Nelson before any state, federal, or private agencies concerning the affairs of Lena Nelson.

RESPONSE: Yes.

See JA at 212.

When questioned regarding these actions during her deposition, Ms. Shanklin testified that she began doing the aforementioned in approximately 2011. *See JA at 207.*

In 2012 and 2013, prior to Lena Nelson's admission to Hillcrest Health Care Center, Ms. Shanklin again exercised various of the rights granted to her by the DPOA document, including the right to sign consent forms, arrange for medical treatment, and admit Ms. Nelson to the hospital upon more than one occasion. A brief review of Ms. Nelson's medical records makes this clear. In short, Ms. Nelson's acted as her mother's Durable Power of Attorney on at least the following occasions:

- January 22, 2012 – Ms. Shanklin signed an "Authorization for Release of Medical Information" at CAMC on Ms. Nelson's behalf. *See JA at 226.*
- January 22, 2012 – Ms. Shanklin signed a "Patient Agreement" at CAMC on Ms. Nelson's behalf, a document required by the hospital prior to admission. *See JA at 227.*

- January 23, 2012 – Ms. Shanklin signed an “Acknowledgement of Consent to Operation, Anesthesia and Other Medical Services” at CAMC on Ms. Nelson’s behalf. *See* JA at 228.
- January 23, 2012 – Ms. Shanklin signed an “Intravenous Sedation/Analgesia Acknowledgement of Consent Form for Diagnostic and Therapeutic Procedures” at CAMC on Ms. Nelson’s behalf. *See* JA at 229.
- September 29, 2012 – Ms. Shanklin signed an “Authorization for Release of Medical Information” at CAMC on Ms. Nelson’s behalf. *See* JA at 230.
- September 29, 2012 – Ms. Shanklin signed a “Patient Agreement” at CAMC on Ms. Nelson’s behalf, again, a document required by the hospital prior to admission. *See* JA at 231.
- September 30, 2012 – Ms. Shanklin signed an “Agreement for Voluntary Admission to Behavioral Health Services Unit” at CAMC on Ms. Nelson’s behalf. *See* JA at 232.
- September 30, 2012 – Ms. Shanklin admitted Ms. Nelson to CAMC as her “Medical Power of Attorney”.² *See* JA at 233.
- October 3, 2012 – Ms. Shanklin signed the “Discharge Summary Sheet” at CAMC on Ms. Nelson’s behalf and further listed herself as the “MPOA”. *See* JA at 237.
- October 3, 2012 – Discharge instructions are given to “patient and MPOA (Kim)” at CAMC. *See* JA at 238-239.
- February 5, 2013 – Ms. Shanklin signed a “Home Health/Medical Equipment/Nursing Home Patient Choice/Consent Form” at CAMC to have her mother transferred to Hillcrest. *See* JA at 239.

Importantly, the WV Department of Health and Human Resources Pre-Admission Screening form—a form required to determine the propriety of placing an individual in a skilled nursing facility prior to said placement—specifically lists Kim Shanklin as “DPOA”. *See* JA at 240. Ms. Shanklin signed her name to this screening form which lists her as DPOA prior to her

² It should be noted that Ms. Nelson did not sign a separate MPOA document, and that the DPOA document gave Ms. Nelson’s Durable Power of Attorney the power to make medical decisions on her behalf.

mother's admission to Hillcrest in order to facilitate said transfer. *See* JA at 246. Further, per her own deposition testimony, Ms. Shanklin chose to place her mother at Hillcrest (at that time known as Boone Nursing) in February 2013, and intentionally chose Hillcrest over other facilities as "it was closer to home for her and family." *See* JA at 163. As such, Ms. Shanklin once again "arranged for medical treatment" of her mother—a right afforded to her as Durable Power of Attorney.

Upon Ms. Nelson's admission to Hillcrest Health Care Center on February 15, 2013, Ms. Shanklin, continuing to act in her capacity as Ms. Nelson's DPOA, signed various documents on her mother's behalf. These documents included a document entitled, in capital letters, "ARBITRATION AGREEMENT" *See* JA at 000122-000130. Stephen Nelson was not present at the facility during the admission process. *See* JA at 000122.

The DPOA document specifically states that Ms. Shanklin was to be DPOA "if, for any reason, Stephen Nelson cannot or will not serve as such" or if he was "unable" or "unwilling" to serve as such. It is clear from the very fact that Stephen Nelson was not present during his mother's admission that he "could not" or was unable or unwilling to act as his mother's DPOA on that day; and, as evidenced above, it was Ms. Shanklin and not Mr. Nelson who had been performing the duties granted by the DPOA document for quite some time. Therefore, on the date of Ms. Nelson's admission to Hillcrest, Ms. Shanklin was properly acting as her mother's DPOA in Stephen Nelson's stead.

Another critical hole in Plaintiff's argument is the deposition testimony of Richard Osburn, the Marketing and Admissions Director at Hillcrest who also signed the Arbitration Agreement on behalf of Hillcrest. Mr. Osburn testified that Ms. Shanklin explicitly represented

to him that she was her mother's DPOA prior to signing the Arbitration Agreement. Specifically, Richard Osburn testified as follows:

Q: Do you recall what [Kim Shanklin's] legal authority was to sign this [Arbitration Agreement]?

A: [S]he, at the time she presented herself and the papers as a Durable Power of Attorney, not – I'm quite certain that's what it was.

...

Q: And you said you did recall Kim [Shanklin] representing to you that she was the Durable Power of Attorney for her mother?

A: I do recall that, yes.

See JA at 000257.

Further, the admission record from Hillcrest lists Ms. Shanklin as “successor POA-Care” and “Responsible Party – financial”. *See* JA at 259. Additionally, upon her mother's admission to Hillcrest, Ms. Shanklin signed a multitude of other documents on her mother's behalf, and, in fact, wrote “DPOA” after her signature on the vast majority of these documents. Along with the Arbitration Agreement, these included an authorization for treatment, authorization for release of protected health information, consent for psychoactive medication therapy, and various immunization consents. *See* JA at 000260-000265.

The testimony of Ms. Shanklin—a well-educated paramedic supervisor who spends at least a quarter of her time reviewing and analyzing medical and administrative documents such as ambulance “run forms”—lends itself to only one possible realistic conclusion. Given her level of education, health care experience, and previous management of her mother's care, Ms. Shanklin was properly acting as DPOA at the time she executed the Arbitration Agreement, but now wishes to change history.

Respondent appears to advocate for a second conclusion, arguing that under West Virginia law, “a person who deals with one alleged to be an agent is bound at his own peril to know the authority of such alleged agency.” *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 152 W.Va. 723, 731 (1969). Plaintiff’s argument confuses the matter insofar as this is not a case of apparent authority but instead a case of **actual authority**. One need only read the DPOA document itself to determine the absolute truth of this statement. Ms. Nelson’s DPOA document clearly states that “if, for any reason, Stephen Nelson cannot or will not serve as [DPOA]” that Kimberly Shanklin was appointed as such. Clearly, Stephen Nelson was not present on the date of his mother’s admission and the date of the signing of the Arbitration Agreement at issue. Therefore, Ms. Shanklin had actual authority per the terms of the DPOA document to sign the Arbitration Agreement.

In fact, throughout the course of Ms. Nelson’s residency at Hillcrest, Ms. Shanklin continued to exercise the rights granted to her by the DPOA document, authorizing staff and medical personnel to give her mother specific medications, send or not send to her the hospital, etc. Again, a brief review of Ms. Nelson’s facility records makes clear that Ms. Shanklin was the primary individual responsible for her mother’s care. Specific occasions where Ms. Shanklin exercised her rights as DPOA are as follows:

- Ms. Shanklin wrote and posted a note on Ms. Nelson’s door stating “DO NOT TURN ON A/C! NO SHOWERS BEFORE 1:00 PM! DO NOT WAKE FOR BREAKFAST! QUESTIONS CALL ME!” See JA at 000266.
- On multiple occasions, as documented by Physician Telephone Order forms, Ms. Shanklin was informed of her mother’s changes in medications. See JA at 000267.

Additionally, the nursing progress notes from Hillcrest, as well as hospital records, demonstrate that Ms. Shanklin (not her brother Stephen Nelson) was making medical decisions

on her mother's behalf throughout her residency at Hillcrest—a right granted to her only through the DPOA document. Specifically:

- August 19, 2014 – Kim, “responsible party” was invited to a care plan meeting for her mother. Kim chose not to attend but a telephone interview was conducted. Kim verbalized that she had no care concerns and stated that she is aware of her mother's medication changes (Coumadin) and “wants nursing to continue to keep an eye on this.” *See* JA at 000269.
- August 22, 2014 – Kim, “responsible party” was notified of Ms. Nelson's agitated behaviors, “responsible party Kim requested to see if doctor would check resident for urinary tract infection due to behaviors when in the facility later this day.” *See* JA at 000270.
- October 9, 2014 – Kim, “responsible party” was notified of new order made for nutrition supplement Glucerna between meals. Kim stated “ok” and thanked the nurse for calling. *See* JA at 000271.
- October 28, 2014 – “Kim/RP” (Responsible Party) voiced concerns regarding her mother's blood glucose levels and requested monitoring. Facility ordered monitoring and Kim was advised of the order and understanding that she would be provided the results when available. *See* JA at 000272.
- November 8, 2014 – Nurse called “resident's daughter Kim who is responsible party” to allow Ms. Nelson to speak with her daughter via phone as resident is crying and stating she wants love from her family. *See* JA at 273.
- November 18, 2014 – An invitation was extended to “Kim/RP” for a multidisciplinary care conference and meeting was held via phone conference. Kim stated she had no issues or complaints at this time, feels her mother is stable and has no issues in relation to her care plan. *See* JA at 000274.
- December 24, 2014 – “Healthcare decision maker Kim Shanklin” was notified of her mother's behaviors and physician orders on medications. *See* JA at 000275.
- January 12, 2015 – Ms. Nelson was found to have a knot on her head. “Kim/MPOA” requested that her mother be sent to the emergency room. *See* JA at 000276.

- February 6, 2015 – “RP Kim” made aware of new physician orders. *See* JA at 000277.
- February 10, 2015 - An invitation was extended to “Kim/RP” for a multidisciplinary care conference. Kim could not attend in person due to illness and requested to attend via phone conference. Kim stated she had no complaints or concerns at this time. Kim also stated that she would bring her issues to management as they arise, that everything has been dealt with and that she has no issues. *See* JA at 000278.
- February 23, 2015 – “RP Kim Shanklin” notified of her mother’s behaviors and medications given, voiced understanding. *See* JA at 000279.
- March 11, 2015 – Kim was contacted regarding her mother’s medications and her behaviors. Kim came to the facility and agreed to allow her mother to have the medication Trazadone, and stated she did not want her mother sent to the hospital despite physician orders. *See* JA at 000280.
- March 11, 2015 – Kim requested her mother’s medication, Norco, be stopped. *See* JA at 000281.
- March 12, 2015 – A multidisciplinary care conference was held and “RP/daughter Kim” was invited. Kim stated she had no concerns or complaints, stated that her mother is doing well at this time, her meds are regulated and she has no issues. *See* JA at 000282.
- March 13, 2015 – Doctor implemented new medication orders, “Responsible party Kim” in facility and aware. *See* JA at 000283.
- March 28, 2015 – Kim Shanklin was contacted regarding her mother’s need for anxiety medication. Kim asked why certain medications were being used and stated she preferred for her mother not to be sent to the hospital. Kim stated that if she is sent out that she is not to be sent to Thomas Memorial Hospital and may only be sent to CAMC General. *See* JA at 000284.
- April 2, 2015 – Kim called and informed of her mother’s medication, Ativan, being given. Kim stated she did not understand why the facility gave her mother this medication because it does not work. Kim was informed it was given due to physician orders. Kim stated she would be present in the morning to speak with the doctor regarding this. *See* JA at 000285.

- April 4, 2015 – Ms. Nelson experienced increased agitation and the physician gave new medication orders. “RP Kim Shanklin” was notified and refused to allow her mother to be placed on these medications, stating multiple times “absolutely no”. *See* JA at 000286.
- July 28, 2015 – A multidisciplinary care conference was held and “RP/daughter Kim” attended. “RP” stated that she had no questions or concerns at this time, as she had not visiting regularly for awhile due to illness. Kim stated that if he has any issues that she will notify staff. *See* JA at 000287.
- October 23, 2015 – “Daughter/responsible party Kim” requested that her mother’s doctor appointment be cancelled and not rescheduled, stating that this doctor was not doing anything for his mother and there was no need to make her go. *See* JA at 000288.
- October 23, 2015 – “Responsible party (Kim)” made aware of new physician orders. *See* JA at 000288.
- October 29, 2015 – Kim requested that a doctor’s appointment be rescheduled, new appointment was made. *See* JA at 000289.
- November 2, 2015 – Kim called facility and requested that her mother stop receiving a certain medication. *See* JA at 000290.
- November 2, 2015 – “Responsible party Kim” notified of new medication orders. *See* JA at 000291.
- November 3, 2015 – “RP Kim” notified of her mother’s behaviors, verbally agreed for certain medications to be administered. *See* JA at 000291.
- November 5, 2015 – Kim called to discuss plan of care. Kim expressed approval to interventions in place and approved a trial of certain medications for her mother; also requested a medication be discontinued. Expressed her beliefs as to what medications work best for her mother. *See* JA at 000292.
- November 30, 2015 – “RP Kim” notified of new physician orders regarding medication change. *See* JA at 000293.
- November 30, 2015 – “Resident’s daughter/responsible party (Kim)” requested her mother’s doctor’s appointment be cancelled. *See* JA at 000293.

- December 1, 2015 – “Responsible Party Kim Shanklin” called after a fall occurred. She agreed to a portable X-ray at the facility and stated she would call back and if X-ray had not yet been completed that she wished her mother to be sent to the hospital. Kim called back 20 minutes later and stated she changed her mind and wanted her mother sent to CAMC General for evaluation. *See* JA at 000294.
- December 1, 2015 – CAMC records state that “Pt.’s daughter Kim is MPOA and states that she does not wish for pt. to return to Hillcrest and reports that she would like her mother to be moved to another facility. *See* JA at 000295.
- December 1, 2015 – CAMC records state that “Pt’s daughter Kim is MPOA” and requested her mother be moved to a facility other than Hillcrest. She reports that she would like her mother moved to Montgomery General Elder Care. *See* JA at 000296.
- December 1, 2015 – CAMC records indicate that “Patient’s daughter Kim is MPOA” and that Kim states she does not want her mother to return to Hillcrest. *See* JA at 000297.
- December 3, 2015 – CAMC records state that “daughter/MPOA” will notify the hospital which skilled nursing facility she wishes for her mother to be discharged to. *See* JA at 0000296.
- December 30, 2015 – “RP/daughter Kim” attended multidisciplinary care conference. Kim stated she has previously discussed any concerns she had with staff and had nothing new to discuss at this time. *See* JA at 000300.
- January 14, 2016 – “MPOA Kim” requested that one of her mother’s medications be discontinued due to sleepiness. *See* JA at 000301.
- February 11, 2016 – “MPOA Kim” requested her mother’s doctor’s appointment to be cancelled and stated she did not want it to be rescheduled. *See* JA at 000302.

Even after her mother was discharged from Hillcrest to Montgomery General Elderly Care, Ms. Shanklin continued to manage her mother’s medical care—a right specifically given to her by the DPOA document—and represent that she was in fact her mother’s DPOA. *See* JA at

000303 (Montgomery General Elderly Care Resident Face Sheet); *see also* JA at 000304 (Montgomery General Elderly Care Continuity of Care Document).

In short, Ms. Shanklin has been acting in accordance with the rights granted to her by the DPOA document for a number of years, both before and during her mother's admission to Hillcrest Health Care Center. It is clear that Ms. Shanklin made medical choices on her mother's behalf, made changes in her medications, permitted and denied specific medications and forms of treatment for her mother, etc. Additionally, as noted above, Ms. Shanklin exercised various other of the rights granted to her by the DPOA document, including endorsing checks and managing banking accounts. Ms. Shanklin continued to act in accordance with the rights granted to her by the DPOA document on the date of her mother's admission to Hillcrest and was properly acting as her mother's DPOA when she signed the Arbitration Agreement at issue in this case. Any argument that Ms. Shanklin did not exercise the rights granted to her pursuant to the DPOA document before her mother's admission, at the time of admission, during her Ms. Nelson's residency, and after Ms. Nelson's residency lacks any semblance of credibility given the documents attached. As such, Respondent's argument must fail.

CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing, these Petitioners respectfully seek a reversal of the Kanawha County Circuit Court Order denying their Motion to Dismiss and Compel Arbitration, and for this Honorable Court to Order the Circuit Court to refer this claim to an arbitral forum.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of July 2017, the foregoing *Petitioner's Reply Brief* was deposited in the U.S. Mail, first class postage prepaid, and sent via facsimile, addressed to all other parties to this appeal as follows:

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